No. 92-1402

In The

Supreme Court of the United States

October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC. AND ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari to the Supreme Court, Appellate Division Second Department of the State of New York

BRIEF OF AMICI CURIAE TOWN OF SMITHTOWN, ONONDAGA COUNTY, BERGEN COUNTY AND SOMERSET COUNTY IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

TABLE OF CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF STATUTES

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INTEREST OF THE *AMICI CURIAE*

Onondaga County, New York and the Town of Smithtown, New York, and the Counties of Bergen and Somerset, New Jersey share an important bond – all have been entrusted with the responsibility of safely, environmentally soundly, economically and efficiently managing the long-term collection and disposal of solid waste generated within their borders. Although the *amici* have fulfilled their responsibilities through different disposal means, means molded by the numerous factors which

influence the solid waste management planning process, flow control mechanisms are fundamental to each *amici's* success.

The safe and proper disposal of garbage and the prevention of groundwater contamination, disease, obnoxious odors and dangerous gases and vermin inherent in solid waste is first and foremost a matter of public health and safety. Waste spreads "disease, pestilence, and death". (*Philadelphia v. New Jersey*, 437 U.S. 617, 631 (1978)). Solid waste collection, hauling and disposal is both a public service as essential as police and fire protection and a public utility as fundamental as sewage disposal and water supply. Waste is not a benign commodity. Waste haulage is not a conventional business enterprise.

I. Interest of Onondaga County

Onondaga County has the basic, operating responsibility to safely manage the garbage generated by the 470,000 citizens within its 794 square miles including the City of Syracuse with which it has a Memorandum of Understanding. The County has adopted an integrated solid waste management program (the "Program") for the disposal of over 300,000 tons of garbage and 100,000 tons of recyclables now being generated in the County, using the Onondaga County Resource Recovery Agency ("OCRRA") as its agent.

OCRRA is a public benefit corporation, duly created and existing pursuant to Title 13-B, § 2045-A of Article 8 of the Public Authorities Law (the "Act"). The County entered into a solid waste "Program Contract" with

OCRRA pursuant to which OCRRA is responsible for establishing a solid waste management system for the use of those municipalities within the County that choose to participate. The responsibilities of OCRRA include the financing, planning, development, acquisition and construction of a waste-to-energy facility, the acquisition or development of an environmentally secure double-lined landfill or other landfill disposal alternatives, the administration and enforcement of recycling laws and the implementation of a program for separating household hazardous waste.

OCRRA is authorized to contract with any municipality located within the County for the receipt and processing of all solid waste generated within the municipality. OCRRA has contracted with 33 of the 35 municipalities located within Onondaga County. Each municipality has voluntarily agreed to direct all waste generated within the municipality to the OCRRA designated facility and OCRRA has agreed to provide disposal service for such waste. Each of the participating municipalities has enacted a flow control ordinance which requires all haulers to deliver all waste generated within the respective municipalities to the OCRRA designated facility. For exampie, in Baldwinsville the hauler must "deliver all of the Solid Waste it collects within the Village to the Onondaga County Resource Recovery Agency System or as directed by the Agency." (Village of Baldwinsville Local Law No. 4 (1993)). The New York State legislature has authorized both the County and its municipalities to require "that all solid waste generated or

originating within their respective boundaries" be delivered "to a specified solid waste management resource recovery facility." (The Act § 2045-t).

OCRRA has contracted with a private company to build and operate a waste-to-energy facility which will provide disposal capacity for all waste generated by the 33 Onondaga municipalities. OCRRA issued over $178,000,000 in bonds to finance the facility which is now under construction. The contract with the private company requires OCRRA to deliver all waste generated by the 33 participating municipalities to the facility during the 25-year term of the agreement. OCRRA has procured landfill disposal rights in an out-of-state, fully permitted, double-lined landfill until the waste-to-energy facility is operational. In its procurement for such landfill capacity, OCRRA selected not the least expensive proposal, but the most environmentally sound, state-of-the-art landfill at the most reasonable price. The haulers for the participating municipalities are directed to deliver all waste to two OCRRA-operated transfer stations for compacting prior to shipment.

Interest of Smithtown

Smithtown is located in Suffolk County on Long Island and encompasses an area of approximately 53.3 square miles. It expects that 92,000 tons of garbage will be generated by its 120,000 residents during 1993. New York State authorized Smithtown to adopt local laws requiring that all waste within its boundaries be delivered to specified facilities. (N.Y. Gen. Mun. Law § 110-bb (McKinney

Supp. 1993). It adopted a flow control ordinance requiring that all waste be "delivered to" a specific solid waste management facility. (Smithtown Code § 177-17 (1991)).

Smithtown developed a comprehensive solid waste management plan, the centerpiece of which is a $176,000,000 waste-to-energy disposal facility sized for all waste generated within both Smithtown and the adjacent Town of Huntington. It was financed with bonds issued by the New York State Environmental Facilities Corporation. The Town of Huntington signed a put-or-pay service agreement, under which Huntington is obligated to deliver a minimum of 140,000 tons per year or pay damages for the unexcused non-delivery of waste equal to the revenues which would have been received from the sale of energy generated from the processing of the undelivered tonnages. Under an intermunicipal agreement with Huntington, Smithtown has subscribed to a portion of this put-or-pay obligation.

Interests of Bergen and Somerset Counties

Bergen County is located in northern New Jersey and borders Rockland County, New York. Bergen County contains 70 municipalities in which 825,380 people reside. Each year over 1,000,000 tons of solid waste are generated within the borders of the County. Somerset County is located in the northern center of the State. Somerset is 305 square miles and has a population of 243,743. It is projected that approximately 165,000 tons of non-recycled solid waste will be generated in the County in 1993.

Bergen and Somerset Counties are responsible for the long-term management of solid waste generated within

their respective borders. (New Jersey Solid Waste Management Act, N.J. Stat. Ann. 13:1E-1 *et seq.*). Their solid waste management plans are based upon and accompanied by a report containing (1) an inventory of the sources, composition and quantity of waste generated within the district; (2) projections of the amounts and composition of solid waste to be generated within the district in each of the 10 years following the year in which the report is prepared; (3) an inventory and appraisal, including the identity, location and life expectancy, of all solid waste facilities within the solid waste management district; and (4) an analysis of existing solid waste collection. (*Id.* 13:1E-21).

Each solid waste management plan contains the County's disposal strategy. Such plans are only adopted following public hearings. (*Id.* § 13:1E-23). Once adopted, the plan must be submitted for the approval of the Commissioner of the Department of Environmental Protection and Energy (the "DEPE"). The DEPE and the Board of Regulatory Commissioners have adopted rules, regulations and administrative orders providing for the interdistrict, intradistrict and interstate flow of solid waste. (*Id.* § 48:13A-4). These rules, regulations and administrative orders set forth the designations of specific waste flows, designating specific facilities to serve specific geographic areas. (N.J. Admin. Code § 7:26-6.2). Additionally, the Board of Regulatory Commissioners has the power to award a franchise to any person of good character engaged in solid waste disposal at rates and charges published in tariffs or contracts accepted by the DEPE. (N.J. Stat. Ann. § 48:13A-5).

Through intensive recycling efforts by Bergen County and the 70 Bergen municipalities, the County has managed to recycle approximately 55% of its total waste stream. Even after such exhaustive recycling, Bergen generates 540,000 tons of waste per year which require disposal. Waste generated in Bergen is delivered to transfer stations where it is compacted for long-haul to either the Essex County waste-to-energy facility or to a state of the art out-of-state privately owned and operated landfill. Bergen, through the Bergen County Utilities Authority (the "BCUA"), has entered into an interdistrict agreement with the Union County Utilities Authority for the long-term disposal of approximately 36% of the waste which remains post-recycling.

The Somerset County solid waste management plan requires that all non-recycled solid waste generated in Somerset County be delivered to two designated transfer stations for compacting and shipment to the Warren County waste-to-energy plant and to a privately owned and operated out-of-state landfill. Under the agreement with the Warren County Pollution Control Finance Authority, Somerset is obligated to deliver a minimum of 1,400 tons per week to the facility. The contract with the out of state landfill requires Somerset to deliver 200 tons per day to that facility.

The State has approved the Bergen and Somerset solid waste management plans and has adopted regulations which ratify the intradistrict, interdistrict and interstate waste flows set forth in the Bergen and Somerset plans. (N.J. Admin. Code § 7:26-6.5(b), (s)).

The New Jersey flow control mechanisms provided by solid waste management plans, state regulatory orders and the issuance of solid waste disposal franchises, when applicable, serve the same public health and financing functions as the ordinances adopted by Clarkstown.

Common Solutions to Common Problems

The *amici* have historically relied upon inexpensive local landfill capacity for disposal of waste generated within their borders. Each, however, has been forced to find alternative disposal solutions. To protect aquifers, New York State required all landfills on Long Island, including Smithtown's and Huntington's, to close by the end of 1990. (N.Y. Envtl. Conserv. Law § 27-0704). Upstate, many municipal landfills in Onondaga County were closed and tagged as state Superfund sites while others could not meet stringent new environmental regulations. In New Jersey, local landfills had filled to capacity.

Due to the inexpensive capital and operating costs associated with the mostly unlined local landfills and their proximity to the locally generated waste, there was little need by local government to implement legal flow control mechanisms. Haulers, who traditionally have not had to consider environmental responsibility, brought waste to the local landfill because it was the least expensive means to dispose of the waste. Today local governments require local flow control to carry out larger public purposes.

New York and New Jersey local governments, under explicit State authority, effectively monopolize all aspects

of basic public services similar to solid waste collection and disposal, such as police and fire protection and sewage disposal and water supply. Sewage disposal and waste disposal are similar. Sewage disposal is ordinarily provided homeowners by backyard septic systems or by sewer lines carrying sewage to a central municipal treatment facility. Homeowners and businesses are routinely obligated to cease using septic tanks, hook up to sewer lines provided by local government on a monopoly basis, and to pay all attendant costs. New Jersey and New York septic tank pumpers are not permitted to disregard sewer line hook-up ordinances, evade the public monopoly sewer system and truck the septic pumpings in interstate commerce. Nor may garbage haulers, the "pipeline" for solid waste, evade governmentally imposed disposal monopolies to truck waste across state borders.

New York and New Jersey empower local government to directly monopolize solid waste. More precisely, throughout both states, municipal employees and assets are regularly utilized to provide collection and disposal services for garbage generated within some neighborhoods. New Jersey and New York local governments have also created such monopolies through privatization as well as by the direct use of municipal labor forces. Waste collection and hauling service is often provided on an exclusive basis in a particular area by a private company selected through competitive bidding.

Currently approximately 30% of the waste generated in Onondaga County is collected by municipal haulers or municipally contracted haulers with exclusive rights to service specific service areas. Forty-five percent of the

waste generated in Smithtown is collected by Town contracted haulers with exclusive rights to service specific service areas. Sixty-three of the 70 Bergen municipalities collect waste through municipal employees or municipally contracted haulers and 15% of residential waste generated in Somerset County is collected by municipal or municipally contracted haulers.

Local governments cannot compete for waste in the marketplace. Local governments, unlike private carters, are required by state and federal mandates to achieve high recycling goals, to prevent the unlawful disposal of hazardous waste, to remove household hazardous waste from the waste stream and to dispose of solid waste in an environmentally sound manner. The costs of implementing measures to achieve these objectives are included, by necessity, in whole or in part in the per ton cost of disposal or "tipping fee" charged to haulers at the local governmentally sponsored disposal facility. (*See* N.J. Stat. Ann. § 48:13A). Private disposal facilities are not saddled with the full burden of these sound public policy objectives; their tipping fees do not freely reflect such costs. Flow control mechanisms are necessary to carry out and fulfill these public policy objectives and requirements.

Municipal governments require control over waste disposal as potentially responsible parties under CERCLA. Despite vigorous public education efforts trash may contain household hazardous waste which can expose local government to joint and several liability when disposed of in Superfund or other dangerous sites. Such "arranger" liability under CERCLA may attach regardless of how the waste was collected – municipally,

franchise or contract hauler, or unregulated private haulage. As a result the *amici* have chosen to sponsor their own facilities and disposal arrangements in order to minimize and control such risk.

After making the decision to construct a waste-to-energy facility, local governments must properly size their facilities and must insure a steady flow of waste so that when constructed the facilities will operate efficiently and in an environmentally correct manner. Proper combustion of the waste requires that the combustion chamber maintain a constant temperature; fluctuations in waste flows due to the inability to direct waste to the facility may well cause fluctuations in temperatures in the combustion chamber resulting in inefficient and environmentally unsound operations. If a waste-to-energy facility is undersized, the municipality will have defeated its purpose of developing a long-term waste disposal strategy for all of the garbage generated within its jurisdiction for which it had disposal responsibility. Flow control laws are fundamental tools necessary to plan adequately sized waste-to-energy facilities.

Bergen and Somerset Counties have heeded New Jersey's call for "regionalization". Bergen has contracted with Essex and Union Counties for capacity at their waste-to-energy facilities and Somerset has contracted for capacity at the Warren County waste-to-energy facilities. In addition to each county's interdistrict arrangement, Bergen and Somerset have been able to procure reasonable pricing for disposal of their remaining waste at state-of-the-art out of state landfills. Absent the flow control mechanism provided by New Jersey's comprehensive scheme, neither County would be able to commit to

delivering minimum amounts of waste to these environmentally sound facilities.

SUMMARY OF ARGUMENT

Petitioners equate a State effort to conserve or hoard remaining landfill capacity with municipal efforts to collect and dispose of all local solid waste in a safe and responsible manner. They argue that this Court should reject a municipal government's attempt to address local public health and safety concerns by use of local municipal waste monopolies because a result of such an attempt might be exclusion of private haulers. The argument continues that the required use of municipal facilities can never be sustained because such monopolistic use might occasionally or permanently result in public charges in excess of those for private transportation to out-of-state landfills. Even though it is the local residents and not the private hauler who bear the burden of such higher charges, coerced aggregation in collection and disposal is still argued to be unconstitutional because it interferes with a hauler's paramount Commerce Clause right to maximize its profits from such waste removal payments.

The *amici* respectfully suggest that Clarkstown be afforded unrestricted freedom in choosing the means to properly fulfill its public health and safety duties, whether it completely prohibits others from participating in the collecting and disposing of waste or whether it requires that private parties involved in the waste disposal process collect, handle, transport and deposit waste in only approved ways, including, most vitally, disposal

at only pre-approved locations. The most relevant prior decisions of this Court upholding public health and safety monopolies for the collection and disposal of waste accorded great respect for the public health and safety decisions of state and local governments in lawfully establishing and structuring such sanitation monopolies. (*See California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905)).

> We perceive no ground to doubt the good faith of the Board of Supervisors; nor can we say that the mode adopted for the suppression of the evils in question was arbitrary or did not have a real, substantial relation to the protection of the public health.
>
> . . . .
>
> The State, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the Board of Supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law. (*California Reduction*, 119 U.S. at 320-21).

Numerous localities have long modeled their own safe waste disposal solutions upon the San Francisco and Detroit municipal monopolies which were approved by this Court in those cases.

> Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating and restraining competition among private collectors. *If any area of the law*

> *can be said to be well settled, this one is.* (*Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981); emphasis added).

Nothing in either the pre-existing or subsequent dormant Commerce Clause line of cases suggests that such municipal public health and safety monopolies are no longer valid alternatives available to local governments. Indeed, decisions before and after 1905 involving analogous direct governmental participation have been upheld under the dormant Commerce Clause.

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), hold only that neither the responsible state nor local government can prohibit or restrict the disposal at privately owned landfills of waste generated out of its jurisdiction without prohibition of local waste as well. Nowhere in any of these decisions is it seriously suggested that commercial designs of an excluded hauler would ever justify invalidating a public health requirement that all solid waste be disposed of at a local facility sized to dispose of all waste generated or found within the locale.

Congress has expressly recognized that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." (Resource Conservation and Recovery Act of 1976, § 1002(a)(4), 42 U.S.C. § 6901(a)(4) (West 1983)). The *amici* urge this Court to continue to so entrust at least this much of the problem of waste disposal to those local governments "primarily" responsible for and actually participating in the collection and disposal of such waste.

Anything less invites the burdens and delays of review by injunction of every such local monopolizing governmental decision.

To now review the ever-changing decisions of each local government struggling to be responsive to Congress, their states, one another and their citizens is to impose further difficulties on their already difficult waste disposal task. The *amici* respectfully suggest that this Court avoid the need for every locality to specially justify its decision to aggregate or monopolize the collection or disposal of its waste in some "rule of reason" balancing inquiry by expressly declining to extend dormant Commerce Clause balancing, at least where it is shown that a locale's "flow control" law is augmenting its own direct participation in the collection and disposal of local waste. Our system of government requires this much respect for the local public health and safety waste collection decisions of voters through the duly enacted laws of their local governments.

ARGUMENT

I. PUBLIC HEALTH AND SAFETY CONCERNS REGARDING REMOVAL AND DISPOSAL OF IMMEDIATELY DANGEROUS WASTE WITHIN MUNICIPALITIES HAVE LONG BEEN SERVED BY LOCAL MUNICIPAL MONOPOLIES. SUCH PUBLIC HEALTH AND SAFETY MONOPOLIES SURVIVE CONSTITUTIONAL SCRUTINY DESPITE THEIR ANTI-COMPETITIVE EFFECTS.

Petitioners argue that they have a right to compete with Clarkstown for waste generated both within and

without Clarkstown because the Commerce Clause abhors "economic protectionism." They argue that local government must directly compete with private industry in the rendering of public health services as essential as the timely collection and disposal of municipal waste. No municipality can ever be permitted to decide to provide such services with respect to *all* waste within its borders, petitioners continue, unless the decision is justified by *pure* public health reasons, untainted by the specific economic goal or benefit of reducing the overall cost to the host municipality and its taxpayers.

What petitioners fail to recognize is the compelling interest of municipalities to adequately size municipal collection and disposal systems so as to be capable of handling *all* waste and how this interest cannot be served in an openly competitive market. For example, should spot market prices exceed those of the municipality, undersized municipal systems would become unable to dispose of waste that is *not* being collected and disposed of by private carters who always remain free to withdraw from the market. This leaves unplanned-for waste to the municipality whenever the cost of privately collecting and disposing rises to such a point that too few private carters remain willing to continue providing competitive services, regardless of whether the municipal system is capable of handling such abandoned waste. If a municipality sized its collection and disposal system so as to be capable of handling 100% of all waste that could reasonably be predicted to require collection and disposal, mandated competition would soon render uneconomic such oversized facilities and thereby inflict real economic

harms upon the municipality. This Court has never suggested in any way that a municipality cannot avoid such harms by a decision to compel collection and disposal of *all* waste within its borders at a charge which applies uniformly to all waste possessors no matter where the waste was generated.

A. Municipal public health monopolization of waste disposal has long been constitutionally recognized by this Court. Disease avoidance is still necessary.

Historically, courts have recognized public health monopolies as necessary for municipalities to attract private capital to participate on its behalf in the provision of such an essential public service as the collection and disposal of municipal solid waste. In *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905), this Court rejected private haulers' "due process" and "takings" claims and upheld injunctions enforcing municipal awards of exclusive collection and disposal monopolies because:

> [T]he municipal authorities might well have doubted whether the substances that were *per se* dangerous or worthless would be separated from such as could be utilized and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the safety of the community could not be assured unless the entire mass of garbage and refuse, constituting the nuisance, from which the danger came, was carried to a crematory where it

> could be promptly destroyed by fire; and thus minimize the danger to the public health. (*California Reduction*, 199 U.S. at 323).

Both *California Reduction* and *Gardner* remain as compelling and persuasive as ever. Recently *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981) rejected efforts to distinguish *California Reduction* and *Gardner*, efforts which are identical to petitioner's:

> They argue that Akron's purpose in acquiring a monopoly over garbage is not public health, as was the purpose in the old cases, but rather making its energy plant more profitable by insulating it from competition for raw materials. A monopoly imposed for that purpose, they argue, is neither necessary nor efficient.
>
> *The old cases are not anachronisms. They are not distinguishable on any of these grounds. The solid waste disposal problem is as serious today for cities as in the past, perhaps more serious.*
>
> . . . .
>
> Neither does the fact that the City appropriates the value and sells some of the recyclable waste, or chooses in manufacturing energy to burn some of the paper and cardboard rather than to resell it, distinguish the old cases. *Under these cases, the City could simply have taken over all garbage collection as in San Francisco, Detroit and Cincinnati, depriving existing collectors of any business at all.*
>
> . . . .
>
> *In each of the cases discussed above the city granted a monopoly right to collect garbage to a single company, permitting that company alone to engage in a profitable business that had previously*

> *been done by several firms*. The courts held that the public interest in regulation of garbage was so great that monopolization of the service and the attendant transfer of profits did not violate the taking or due process clause. (*Hybud*, 654 F.2d at 1193-94; emphasis added).

Adherence to these municipal waste precedents is still necessary for public health and safety reasons. Such dangers persist. Prevention of disease is and will always be the core reason for the results in *California Reduction* and *Gardner*.

B. Local governmental public health monopolies' receipt of financial benefits does not render them subject to Commerce Clause review.

Municipalities have long used local governmental monopolies to attract private capital for public ends. Much of our infrastructure was originally built and operated through such municipal monopoly grants. The constitutionality of such monopolies have been repeatedly challenged by both competitors and paying customers. (*E.g., Hutcheson v. City of Valdosta*, 227 U.S. 303 (1913); *District of Columbia v. Brooke*, 214 U.S. 138 (1909); *Ouachita Packet Co. v. Aiken*, 121 U.S. 444 (1887); *Morgan's Steamship Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886); *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)). None of the wide-ranging full-scale constitutional assaults on the anti-competitive effects of such municipally established monopolies ever succeeded in overcoming a public health and safety justification.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community."

. . . .

In *Gibbons v. Ogden*, Chief Justice Marshall, speaking of inspection laws passed by the States, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government – all of which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation." (*Slaughter-House Cases*, 83 U.S. (16 Wall.) at 62-63 (citations omitted)).

No such monopoly case ever held that indisputably strong public health and safety legislative purposes are to yield to less detrimental impacts upon interstate commerce. "Balancing" should not be necessary when dealing with the public health and safety, i.e. "We are not, then, dealing here with state legislation in the field of *safety*

where the propriety of local regulation has long been recognized'." (*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970)).

These same decisions have repeatedly held that federal courts should not interfere with local public health and safety monopolies in "works and improvements of a local character."

> In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulations made by the State, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority. It is for Congress alone, under its power to regulate commerce with foreign nations and among the several states, to correct any abuses that may arise, or to assume to itself the regulation of the subject. (*Ouachita Packet Co. v. Aiken*, 121 U.S. 444, 447-48 (1887)).

The financing of these local public health and safety solutions necessitated and justified their monopolizing features. For example, in *Packet Co. v. Catlettsburg*, the requirement that Ohio river steamers exclusively use the town wharf instead of the river bank within its borders, withstood constitutional scrutiny and was upheld as a coercive municipal monopoly permissible under the Commerce Clause. (*Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881)). More recently, in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), this Court recognized a municipality's financing needs and upheld local airport charges on users of a municipal airport.

> We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed upon interstate and domestic users alike. (*Id.* at 714).

Because many local governments have long relied on these established Commerce Clause principles in forming monopolies, including municipal waste monopolies, and because public health and safety concerns in the area of solid waste collection and disposal are as compelling today as they have ever been, the *amici* respectively suggest that this Court apply such precedent to uphold Clarkstown's municipal waste monopoly.

II. PRIVATE LANDFILL PRECEDENTS DO NOT INVALIDATE MUNICIPAL WASTE MONOPOLIES.

This Court's decisions striking down landfill conservation laws which attempted to exclude out-of-state waste do not lessen the traditional respect for public health and financing justifications for "flow control" laws. The conservation principles on which those decisions were based would be unaffected by this Court's continued approval of municipal collection and disposal monopolies.

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), each invalidated discriminatory laws which restricted access

to privately owned landfills. Such landfills had previously accepted waste from local as well as out-of-state waste generators, but were prevented from receiving out-of-state waste unless special permissions were obtained or special fees paid. In each instance, the restrictions had been adopted, not because of immediately threatening local public health concerns, but for long term conservation reasons. The cases had nothing to do with a decision by a local government, responsible for the collection and disposal of waste in its jurisdiction and actively engaged in protecting its citizens from imminent public health and safety threats, to aggregate and monopolize its collection and disposal services. In fact, each decision clearly suggested that had there been any such imminent public health or safety justification the opposite conclusion would have resulted. (*Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2027 ("Of course, *our conclusion would be different* if the imported waste raised health or other concerns not presented by Michigan waste." (emphasis added); *Philadelphia v. New Jersey*, 437 U.S. at 626, 629 ("There has been no claim here that the very movement of waste into or through New Jersey endangers health. . . . "); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2015 ("There is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. . . . ")).

In the instant case, there were an abundance of genuine and compelling health and safety concerns being voiced at the public hearing leading to Clarkstown's decision to limit disposal to a single site. (J.A. at 34-68). Such evidence also supports the equally compelling implementation of that decision via a wholly non-discriminatory –

all wastes – monopolizing requirement. Thus, the *Philadelphia – Fort Gratiot – Chemical Waste* rejection of conservation as an acceptable discrimination rationale simply has little or nothing in common with Clarkstown's decision.

Although Clarkstown's plan does offer potential financial advantage through bulk purchases, nothing in these conservation decisions suggests that such possible financial benefits would ever invalidate legitimate public health and safety monopolies under the dormant Commerce Clause. Indeed, *Philadelphia v. New Jersey* and *Fort Gratiot Sanitary Landfill*, each expressly disclaimed any opinion as to the appropriateness of the municipalities' policies in even the conservation of their own facilities. (*Philadelphia v. New Jersey*, 437 U.S. at 627-628 n.6; *Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2023).

Thus, these cases simply hold that the burden of conserving disposal resources must not be borne solely by out-of-state interests. By attempting to do so, a benefit was transferred to in-state users, even though public funds or credit had not been used to support the privately owned landfill businesses.

A. The market participant doctrine supports reaffirming the decisions in *California Reduction* and *Gardner* validating municipal waste monopolies.

The market participant doctrine provides an independent basis for the *per se* validation of flow control laws enacted by a responsible local government where it is actively participating in the collection and disposal of

municipal waste through exclusivity or monopolistic controls having both public health and public finance benefits. (*Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)). The *amici* respectfully suggest that this rule comports with *California Reduction* and *Gardner* and this Court should expressly extend it to include municipal waste monopolies.

Investing time, effort and funds in a fundamental government operation like sanitary waste disposal clearly justifies the need for a state to have the option of excluding competition in order to conserve public funds through non-discriminatory user fees intended to pay for that investment. Such exclusivity choices have been repeatedly upheld in older monopoly cases for essentially the same "sovereignty" reasons as underlie this Court's recent market participation cases. Thus, if the State may restrain competition in interstate commerce when dispensing funds in areas not traditionally considered governmental functions, it would seem that more flexibility, not less, should be afforded it when committing funds in more traditional areas. (*White v. Massachusetts Council of Constr. Employers*, 460 U.S. at 214-215). Indeed, the type of monopoly at issue here has long been used to implement this most traditional municipal task.

As in *White*, the local government here has a clear financial participation in the relevant market. Under its five-year put-or-pay financing commitment, if sufficient waste is produced annually, no direct Clarkstown payments will be required; but if insufficient, Clarkstown must pay. This sort of financing guarantee constitutes

participation in most marketplaces. Indeed, such governmental assurances of performance are often necessary to induce lenders to loan moneys in order to construct facilities. Nothing in the market participation cases suggests that Clarkstown's monopoly, operating in conjunction with its disposal guarantee, would not fall within the rule expressed therein. In addition, Clarkstown's potential CERCLA liability should bring it within these prior marketplace decisions. (*B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992)).

For example, the court in *Swin Resources Systems, Inc. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), upheld a local county's market participant status in operating its landfill and thereby exempted it from the reach of the dormant Commerce Clause. And although there are some differences between a municipality's operation of a transfer station and a landfill, the more meaningful similarities would seem to control. And as a practical matter, aggregating the waste at the transfer station creates more financial latitude for Clarkstown in purchasing transportation and landfill services. Such advantages were noted as important factors by the court in *J. Filiberto Sanitation v. Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988):

> The transfer station is the county's only disposal facility. As such it is irreplaceable. As a centralized depository, it is the basis of the county's ability to plan and execute long- and short-term disposal arrangements. As such, it is indispensable. (*Id.* at 922).

The *amici* respectfully submit that the basic rationale in this Court's market participation decisions wholly justifies its application to Clarkstown's participation in waste collection and disposal through its transfer station, its financially sustaining put-or-pay commitment and the chosen "flow control" means of fulfilling it.

B. Immunization of municipal sewer monopolies under the Sherman Act supports immunization under the Commerce Clause.

The similarity of the goals of the Sherman Act and dormant Commerce Clause jurisprudence suggests that this Court's *per se* immunization in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) of municipal public health and safety monopolies under the Sherman Act also supports, by analogy, a *per se* immunity result under the Commerce Clause. If a court should hesitate to uphold *per se* immunity under the Sherman Act for some government business monopolies not presenting genuine safety and health needs (see, e.g. *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982)), it should be equally hesitant under the Commerce Clause; in both cases the need for a rule of reason type of balancing inquiry with all of its attendant transaction costs may be justified by the more detailed and comprehensive economic understandings potentially available.

New York State authorized Clarkstown to impose "appropriate and reasonable limitations" on "competition" by requiring "that *all* solid waste" no matter its origins "shall be delivered to a specified" facility. (Rockland County – Solid Waste Treatment and Disposal Act,

ch. 569, McKinney's 1991 Laws of New York 1072). Clarkstown's equitable ownership and exclusive use of the transfer station makes it a constitutionally valid "actor" within the meaning of the rationales behind sovereign immunity under the Sherman Act. (*Parker v. Brown*, 317 U.S. 341 (1943); *Olsen v. Smith*, 195 U.S. 332 (1904); *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984)).

CONCLUSION

In areas of public health and safety, where national uniformity is simply untenable, the decisions of local governments should continue to be validated by the courts, even in the case of a municipally-imposed monopoly. (*Parker* v. *Brown*, 317 U.S. 341, 352 (1943)). Such federalism considerations demonstrate why petitioners' attempt to extend backwards three private landfill conservation decisions to local governments chiefly responsible for collecting and disposing of solid waste must be denied. Those decisions were premised on the need to resolve conflicting, yet equally valid, interests between disposing states and landfill-conserving states. Local monopolizing decisions being made and adjusted in response to the needs of local communities simply do not yield such conflicts.

The *amici* respectfully commend to this Court that it continue entrusting to the states their waste monopolizing decisions.

For these reasons, the decision below should be affirmed.

Respectfully Submitted,

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